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THE HISTORY, PHILOSOPHY, AND STRUCTURE OF THE AMERICAN CONSTITUTION

INDIVIDUAL RIGHTS AND THE AMERICAN CONSTITUTION

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INTRODUCTION

The Roberts Court has completed its third term and Chief Justice Roberts is now really in charge — well, most of the time. Marked by neither the surprising unanimity of Roberts' initial term, nor the record number of 5-4 cases in his second, the third term may have been a charm for Roberts: a sure and steady diet of 6-3s or better, with the Chief in the majority 90% of the time. While Justice Kennedy can still swing an important outcome, as in his long disquisition extending the writ of habeas corpus to noncitizens being held outside the sovereign territory of the U.S. in Guantanamo, *Boumediene v. Bush* (2008 U.S. LEXIS 4887), or his disapproval of the death penalty for child rape, *Kennedy v. Louisiana* (2008 U.S. LEXIS 5262), for the most part, the Chief has mastered a Supreme Court version of, if you will pardon the colloquial, "face"-book, in order to have a better chance of having the Court see things his way.

This is how it works: concerned that misusing a drug protocol might in some future case result in the "cruel" administration of the death penalty, leave it for another day (*Baze v. Kentucky*, 128 S. Ct. 1520 (2008)). Troubled that a voter ID requirement might prove to unduly burden the exercise of the franchise of the elderly, the poor, or the disabled, well, put that one off as well (*Crawford v. Indiana*, 128 S.Ct. 1610 (2008)). Think some protected speech might run afoul of a statute designed to stop the pandering of child porn, rely on the *scienter* element to eliminate over-breadth (*U.S. v. Williams*, 128 S.Ct. 1830 (2008)). The new quasi-consensus model of the high court is to grant review, take a peek, toss around the possible shortcomings of the law or practice under review, and if the justices think matters are mostly all right, then just leave it at that before disagreement breaks out. This is a winning play all around: the Chief imposes his discipline of restraint not to decide more than necessary; potential dissenters get to outline the limits of their tolerance for the majority view, and Justice Kennedy gets to continue his

engagement as the Hamlet of the bench and be on both sides.

Is this leave-for-another-day mentality good for the law's development and its uniform application? Maybe. It more or less vindicates democratic choices and it can build good will that might be relied upon when the Justices are ideologically divided over one thing or another. Practitioners may see only empty suits, and while that can be true, it has thus far not turned out to be. Lower court "tailors" are more than happy to finish the job, sometimes though, as in the partial birth abortion cases, doing a more complete makeover than a modest alteration of the high court's loose-fitting wardrobe. The Virginia Supreme Court, for example, struck down as applied an abortion limitation that was virtually identical to the federal restriction upheld by the Supremes on its face a year earlier. Compare *Gonzales v. Carhart* (127 S.Ct. 1610 (2007) to *Richmond Medical Center v. Herring,* 527 F.3d 128 (4th Cir. 2007).

Beyond the new-found habeas right for the Gitmo detainees, other notable cases include: the invalidation of the D.C. handgun law, which everyone saw coming but wondered just how the master of originalism (Justice Scalia) would exercise his craft (*Dist. of Columbia v. Heller*, 2008 U.S. LEXIS 5268); Justice Stevens' personal declaration against the death penalty (*Baze v. Kentucky*, 128 S.Ct. 1520 (2008)); the reaffirmation of the authority of states to favor their own local public selves (as opposed to showing favoritism for private businesses which is still a dormant commerce clause no-no) by granting a tax exemption only for its own state bonds (*Kentucky v. Davis*, 128 S.Ct. 1801 (2008)); no exception to the 6th Amendment confrontation clause when the reason the testimonial witness isn't at trial to be cross-examined is because she's dead — presumably because she had been killed by the defendant; it might have seemed logical to grant an exception to the confrontation clause, except that the "presumably" part above is exactly what has to be proven to a jury first beyond a reasonable doubt (*Giles v. California*, 2008 U.S. LEXIS 5264); and an unusual number of cases where civil rights plaintiffs walked away victorious: the court ruled that section 1981 includes a racial retaliation claim, (*CBOCS West, Inc. v. Humphries*, 128 S.Ct. 1951 (2008)); and that federal workers may bring a claim that they were retaliated against because of age (*Gomez-Perez v. Potter*, 128 S.Ct. 1931

(2008)); and staying with age, employers — not employees — have the burden of giving reasonable non-age explanations for decisions that have a disproportionate impact on that basis (*Meacham v. Knolls Atomic Power Laboratory*, 2008 U.S. LEXIS 5029).

Meanwhile, of course, it's an election year, and there is sure to be an argument that this or that candidate deserves support for whom he might appoint to the Court in the event of a vacancy. John McCain has already tried to fire up his base with a speech that seemed to condemn judges generally (and perhaps unfairly) as activists. Senator Obama is looking not just for competence but also for empathetic judges with "good hearts."

Whatever side you're on in the election, more subtle evaluations of judges are good for the system. There's far too much casual labeling of so-and-so as a Reagan or Clinton or Bush judge. Sure, there is some truth to the shorthand, but it is also corrosive to the rule of law. And in any event, in Term Three, Roberts and Alito themselves parted company on several pivotal votes dealing with civil rights and federalism. It seems going into the 2008 election, you can't tell the players even with a score card, and as a matter of equal justice under law and judging cases on their individual merits that has to be good.

DWK July 4, 2008
SBP
JCE
RCM

Insert at: ACO, p. li
HISTORY, p. xliii
INDIVIDUAL RIGHTS, p. xlix
SUPREME COURT JUSTICES

Please insert in lieu of the late Chief Justice William Hubbs Rehnquist and the retired Associate Justice Sandra Day O'Connor:

John G. Roberts, Jr., Chief Justice of the United States, born in Buffalo, New York, January 27, 1955. He married Jane Marie Sullivan in 1996; they have two children — Josephine and John. He received an A.B. from Harvard College in 1976 and a J.D. from Harvard Law School in 1979. He served as a law clerk for Henry J. Friendly of the United States Court of Appeals for the Second Circuit from 1979-1980 and as a law clerk for then-Associate Justice William H. Rehnquist of the Supreme Court of the United States during the 1980 Term. He was Special Assistant to the Attorney General, U.S. Department of Justice from 1981-1982, Associate Counsel to President Ronald Reagan, White House Counsel's Office from 1982-1986, and Principal Deputy Solicitor General, U.S. Department of Justice from 1989-1993. From 1986-1989 and 1993-2003, he practiced law in Washington, D.C. He was appointed to the United States Court of Appeals for the District of Columbia Circuit in 2003. President George W. Bush nominated him as Chief Justice of the United States, and he took his seat on September 29, 2005.

Samuel Anthony Alito, Jr., Associate Justice, born in Trenton, New Jersey, April 1, 1950. He married Martha-Ann Bomgardner in 1985, and has two children — Philip and Laura. He received an A.B. from Princeton University in 1972 and a J.D. from Yale Law School in 1975. He served as a law clerk for Leonard I. Garth of the United States Court of Appeals for the Third Circuit from 1976-1977. He was Assistant U.S. Attorney, District of New Jersey, 1977-1981, Assistant

to the Solicitor General, U.S. Department of Justice, 1981-1985, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, 1985-1987, and U.S. Attorney, District of New Jersey, 1987-1990. He was appointed to the United States Court of Appeals for the Third Circuit in 1990. President George W. Bush nominated him as an Associate Justice of the Supreme Court, and he took his seat on January 31, 2006.